Supreme Court, U.S.
FILED
No. 04 15 16 MAY 10 2005
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In The

Supreme Court of the United States

STEVEN CROTTS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio State Supreme Court

PETITION FOR WRIT OF CERTIORARI

STEVEN CROTTS #430-972
1150 North Main Street
P.O. Box 788
Mansfield, Ohio 44901-0788
Petitioner, *Pro Se*

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER IT IS A VIOLATION OF THE SIXTH AMENDMENT TO PROSECUTE SOMEONE OF A CRIME BASED ON EXPOSING SOMEONE TO AN ENVIRONMENT WHERE HOMOSEXUALITY IS ACCEPTABLE?

II. WHETHER CROTTS' FIRST AND SIXTH AMENDMENT RIGHTS WERE VIOLATED BY ALLOWING THE STATE TO PROVE CROTTS GUILTY BY USING THE EVIDENCE OF EXPOSING A CHILD TO A "HOMOSEXUAL" CHURCH?

III. WHETHER THE STATE VIOLATED CROTTS' SIXTH AMENDMENT RIGHT BY PRESENTING INFORMATION OF FACT THAT WAS FALLACIOUS AND NOT IN THE TRIAL RECORD?

IV. WHETHER THE STATE IS NO LONGER PROTECTED FROM JUDICIAL IMMUNITY BECAUSE THEY PUBLISHED DAMAGING INFORMATION OF FACT THAT IS FALSE IN VIOLATION OF ARTICLE VI, CL. 2 OF THE UNITED STATES CONSTITUTION?

LIST OF PARTIES

All parties to this proceeding are listed in the caption of the case.

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OPINIONS BELOW

Opinion and Order of the Eighth District Court of Appeals for Cuyahoga County, Ohio, May 27, 2003, Case No. CA02081477, unreported.

Opinion and Order of the Ohio State Supreme Court, December 15, 2004, Case No. 2003-1161, ___ Ohio St.3d ___.

Opinion and Order of the Ohio State Supreme Court denying reconsideration, February 16, 2005, Case No. 2003-1161.

BASIS FOR JURISDICTION

The date upon which the Ohio State Supreme Court entered its decision in this case was December 15, 2004. Reconsideration [Rehearing] was sought and denied on February 16, 2005.

This timely Petition for Writ of Certiorari is presented under the authority of 28 U.S.C.A. presented under the authority of 28 U.S.C.A. § 1254(1) and/or 28 U.S.C.A. § 1257(a), which vests jurisdiction in this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Cl. 2, United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall

be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

First Amendment, United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth Amendment § 1, United States Constitution:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The following are topics of this case: The controversy within churches of accepting homosexuals, the policy of don't ask, don't tell, the impartiality caused by implying someone has AIDS, child molestation, homosexual custody of children, and the ethical behaviors of judges.

At the center of the ruling within the Ohio State Supreme Court is the following statement.

"The trial court granted Crotts' motion to exclude evidence that he is homosexual. No direct evidence that Crotts is gay was admitted. Testimony that Crotts took the children to allegedly homosexual churches does not lead so inexorably to the conclusion that he is homosexual that its admission was an abuse of discretion. Theoretically, testimony that a heterosexual male took children to a homosexual church would be more supportive of the state's theory that it was done for the purpose of desensitizing J., because a straight male would have less reason to attend a gay church, and his motive for taking a child there would be that more suspicious."[1]

This appeal to the United States Supreme Court does not set Crotts free but simply allows him to be tried on the facts within an impartial court. It is a complaint arguing not merely the violation of Crotts' First, Sixth and Fourteenth Amendment rights but also misconduct on the part of the Ohio State Supreme Court Justices.

It is ridiculous, unreasonable and prejudicial to consider taking a child to the United Church of Christ, a

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[1] See, Appendix A, Paragraph 26.

Unitarian Church or other churches that accept gay people a "suspicious" act.

The reasoning for such a conclusion is even more outrageous. These churches are said to desensitize children. What is meant by "desensitize"? Is it wrong to tell a child that being gay is acceptable? Would the State argue that if the person were a young girl that a male taking her to a church which only accepts heterosexuals is a suspicious act because the church supports the idea of a man and a woman being together, therefore the child could be desensitized to pedophilia?

Many Christian conservatives do not want their children to be taught that it is acceptable to be gay. James Dobson who is what the "Wall Street Journal" calls "the most influential single voice in the ranks of Christian conservatives" stated, "I believe if parents have children in a State like California that begins teaching homosexuality in kindergarten and for twelve years propagandizes them with this and other immoral teachings, such as safe-sex ideology, then they ought to consider getting out of there. We must monitor the school curriculum and take steps to protect our kids."[2]

Even though many people do not want their children to be taught that there is nothing wrong with being gay, is it fair to prosecute someone based on exposing someone to the idea that homosexuality is acceptable?

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[2] See, Pentecostal Evangel, Jan. 9, 2005, page 12, a publication of the Assemblies of God Church.

In *R.A.V. v. St. Paul*,[3] Justice Scalia gave the opinion stating it was unconstitutional to prosecute someone for doing something that could arouse anger or alarm a resentment based on religion, creed or gender.

By allowing the evidence of a homosexual church to be presented they aroused the anger and resentment of the jury, thus, creating partiality within the court based on religious belief.

In *Allegheny v. A.C.L.U.*,[4] the principle was established that the government must neither promote nor condemn religion. Thus, one cannot discriminate between religious groups because they arouse anger or resentment within the community exposing children to views some find offensive.

There is a religious debate going on with a conservative "moral" majority coercing political leaders to implement their religious opinions regarding homosexuality.[5]

By using evidence regarding a homosexual church within court it entangles the government in a religious debate.

The Ohio State Supreme Court's statements about prejudice and unfair prejudice, as well as the statement made agreeing to what was "tautologically true" only to state later "it is not true in this case" shows the Ohio State

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[3] See, *R.A.V. v. St. Paul*, 112 S.Ct. 2538 (1992).

[4] *County of Allegheny v. A.C.L.U., Greater Pittsburg Chapter*, 109 S.Ct. 3086 (1989).

[5] See, Pentecostal Evangel, Jan. 9, 2005, page 12, a publication of the Assemblies of God Church.

Supreme Court Justices using "double talk" to argue against the appellate court.

Furthermore, statements made in paragraph 21 of Appendix A were not true statements of fact as will be shown in the following Reasons for Granting the Writ.

REASONS FOR GRANTING THE WRIT

The First Amendment rights of thousands of members of the United Church of Christ, the Unitarian Church, the Anglican Church, the Metropolitan Community Church and many other churches that accept gay people are at risk within the ruling of the Ohio State Supreme Court.

The First Amendment rights of those who expose children to homosexuality through home, adoption, work and military services are also in question and should be a reason to grant this Writ.

But the most important factor in the consideration of this Writ is what history has taught us regarding issues of Church and State.

Justice Rehnquist in *Wallace v. Jeffree*,[6] called for courts to consider all historical evidence regarding Church and State.

James Madison seemed to foresee the problem of an all powerful majority (Moral Majority) that wishes to impose their religious and political views on the minority. He speaks of the ways the majority seeks to remove the factions.

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[6] See, *Wallace v. Jeffree*, 105 S.Ct. 2789 (1985).

In "The Federalist,"[7] James Madison said:

> "There are again two methods of removing the cause of factions: the one by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interest."

The urgency for the High Court to affirm liberty for all can be best seen within the advertisement of periodicals that are directed at the gay community.[8]

In "The Advocate," the only ads for legal assistance are for immigration lawyers. The High Court should consider the loss of talent and creativity that homosexuals have provided within this country. Production companies like "Dream Works" might move north. The talent behind the "Disney Corporation" and the fashion industry could leave this country because the High Court fails to affirm the constitutional protections.

No one explains the problem we face today better than Thomas Jefferson.

In his "Notes on the State of Virginia" he went through a brief history of religion in America. The persecution of one religious group over another was common with penalties against those who did not baptize their children. Children were forcefully taken from parents who did not accept the orthodox view.

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[7] The Norton Anthology of American Literature, 5th Edit., Vol. 1, Norton & Company, page 746, "The Federalist" (1998).

[8] See, "The Advocate," April 12, 2005, LPI Media, Inc., 6922 Hollywood Blvd., Suite 1000, Los Angeles, California 90028.

Jefferson wrote:

> "It is error alone which needs the support of government. Truth can stand by itself. Subject opinion to coercion: whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons. And why subject it to coercion? To produce uniformity . . . Millions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch towards uniformity. What has been the effect of coercion? To make one half the world fools, and the other hypocrites."[9]

For centuries the Christian world has thought of homosexuals as the same kind of evil people (who lived in Sodom) as spoken of in the Bible. Yet they have ignored the common sense description of Sodom that does not relate to homosexuality as is Ezekiel 16:49. "Now this was the sin of your sister Sodom. She and her daughters were arrogant, overfed and unconcerned; they did not help the poor and needy."[10]

The religious conservatives, even though they know that studies show that only a small minority can change their sexual orientation, want gay people to live as hypocrites. It's alright to be gay as long as you don't tell anyone. Don't ask, Don't tell. As Jefferson described such behavior as making half fools and half hypocrites.

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[9] See, The Norton Anthology of American Literature, 5th Edit., Vol. 1, Norton & Company, pages 726-727 (1998).

[10] See, the Bible, The New International Version, Ezekiel 16:49.

You can't have it both ways. You can't place T.V. shows about gay people like "Will and Grace" on prime time for all to see and convict a person of pedophilia based on the idea that exposing a child to homosexuality leads to pedophilia. Justice Rehnquist wrote in his dissenting opinion in *Jeffree*, supra, "Particularly when we are interpreting the constitution, 'a page in history is worth a volume of logic.'" This statement cannot be illustrated better than by comparing the present case to Salem Witch Trials.

In the present case, a boy named Ronnie Justice, after speaking with his teacher at the fundamentalist school, "repented" of his homosexuality and accused Crotts of touching his leg while sitting next to him. Mr. Crotts was indicted for Gross Sexual Imposition with force for simply sitting next to the boy. This case was severed before the trial and dismissed after Crotts was sentenced.[11]

In the Salem trial of Martha Carrier, the following was reported:

> "Before the trial of this prisoner several of her own children had frankly and fully confessed not only that they were witches themselves, but that their mother had made them so. This confession they made with great shows of repentance, and with much demonstration of truth. They related place, time, occasion; they gave an account of journeys, meetings and mischief by them performed, and were very credible in what they said. Nevertheless, this evidence was not produced against the prisoner at the bar, in as much as there was other evidence enough to proceed

[11] Appendix D, Affidavit of Psychiatric Counselor.

> upon. . . . One Lady, who likewise confessed her share in the witchcraft, now testified, that she and the prisoner were once bodily present at a witch meeting in Salem Village; and that she knew the prisoner to be a witch, and to have been at a diabolical sacrament, and that the prisoner was the undoing of her children by enticing them into the snare of the devil."[12]

The following statements of fact were placed in the record by the Ohio State Supreme Court to slander Crotts in the same way wild allegations were made against Martha Carrier in Salem:

> 1. "The trial court excluded from testimony that Crotts is homosexual or has AIDS."[13]
>
> Crotts has never had AIDS, nor did the court have access to any information proving he had AIDS. This statement could make the Ohio State Supreme Court Justices liable for damages caused by Crotts' inability to get insurance in the future.
>
> 2. "The court severed this case from charges that Crotts sexually abused J's twin brother."
>
> The case that was severed was concerning a Ronnie Justice.[14]
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> Other factual errors can be found within the assignment of errors. Compare assignment of

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[12] See, The Norton Anthology of American Literature, 5th Edit., Vol. 1, Norton & Company, pages 374-378 (1998).

[13] See, Appendix E, Trial Transcripts, pages 1, 2, 3.

[14] See, Appendix D, Psychiatric Counselor and Appendix F, Indictment, pages 1 to 3.

error number three in the appellate court with the same in the Ohio State Supreme Court.[15]

3. "The photos of P and his friend were admitted only to show that Crotts was indeed sexually attracted to young boys."

This statement would make one believe that they were boys and that they were young. One of these so called young boys in the picture was an 18 year old man. The other was an older boy of 16.[16, 17]

4. "J's testimony that he viewed child pornography on Crotts's computer . . . J Testified to seeing 'naked people' while working on the internet unsupervised." Crotts's computers were taken by police. The police found no "nude people" on the computers. No child pornography charges were filed.[18]

There was no evidence that Crotts was attracted to minors. Nor was there any physical evidence that "Crotts exposed J to sex through photos, movies, casual nudity." The only evidence was the prosecutor's theory that Crotts exposed him to "homosexual" churches to desensitize J.

The Ohio State Supreme Court Justices should be held to the highest standards of ethical behavior and not bend the law to suit their religious, political or social agenda.

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[15] See, Appendix A, paragraph 7; and Appendix C, page 10.

[16] See, Appendix A, paragraph 21.

[17] See, Appendix C, page 19.

[18] See, Appendix F, pocket sheet and original charge, pages 4 to 14.

In *Beauhanais v. Illinois*,[19] an Illinois State law made it a crime to defame any "class of citizens, of any race, color creed, or religion by exposing the class members to contempt, derision, or obloquy. . . . " Justice Felix Frankfurter noted that "resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." He upheld the group libel law and tacitly recognized that racially or religiously bigoted maledictions seek to close minds permanently, not to open them to ideas, and seek to exploit the human instinct to find vulnerable scapegoats to vent personal or professional unhappiness.

Within the Ohio Rules of Appellate Procedure, Rule 12(B) states:

> "When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order."[20]

The Ohio State Supreme Court reasoned that the appeal court did not understand prejudice.

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[19] See, *Beauhanais v. Illinois*, 72 S.Ct. 725 (1952).

[20] See, Ohio Rules of Appellate Procedure, Rule 12(B).

They speak at length trying to prove there is prejudice and unfair prejudice. However, the Constitution simply guarantees that the courts be impartial.

Partiality is self interest that leads to favorites, its prejudice, unreasonable and ridiculous. Color, family nation and many other things of like nature, modify it. But impartiality knows no race, no color, no gender. It calls every man a brother and seeks the interest of all and of each. The fact that man is man, and not that he is of our party, of our complexion or of our town, State or Nation – that he is a creature of God, that he is capable of virtue and happiness.[21]

By the Ohio State Supreme Court adding the word "unfair prejudice," one would think that impartiality should not be expected and the blinds of the Goddess of Justice should be taken off with scales weighted down by Lady Justice's hand.

They allow themselves the privilege of prejudice. After all they reason that taking a child to a homosexual church would not arouse in some a sense of horror. Even though they theorize it is a suspicious place.[22]

Let it be clear that the gay church in question is the United Church of Christ. This church was the church of the Pilgrims that fled England from persecution in 1620. They were the separatist churches that were persecuted by the puritans of New England. They were the Congregationalist of Johnathan Edwards' Revivals. They were

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[21] See, Finney's Systematic Theology, Bethany House Publishers, by Charles Finney, 1878 Edition, page 145.

[22] See, Appendix A, paragraph 24.

Abolitionists who despite the Southern Baptist who held their Bibles high and said the Bible says slave serve your masters. They held them Bibles and said there is but one Law and that is the Law of Love, therefore, free your slaves. These are the churches that founded Harvard and Yale in order to train ministers.

> "Congregationalism's strong emphasis on local control in local religious matters contributed to the development of American beliefs in democratic civil government. During the early 1700's, for example, John Wise and other Congregationalist ministers opposed efforts by some religious and political leaders to deprive people of the right to direct their own affairs . . . In 1931, Congregationalist churches merged with a union of three smaller groups to form the Congregational Christian Churches. These churches merged with the Evangelical and Reformed Churches in 1957 to form the United Church of Christ."[23]

The United Church of Christ was the first to ordain a black minister. The members of their congregation were the leaders of the women's suffrage movement. The United Church of Christ is the leading liberal church in the nation. They have committees within their church with names like "The Peace and Social Justice Committee." Some of the largest, oldest, most well-established churches in the United States belong to the United Church of Christ.[24] This case is about one of these great pillars of our society. The conservative right with their radical fundamentalism tries

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[23] See, Finney's Systematic Theology, Bethany House Publishers, by Charles Finney, 1878 Edition, pages 23-24.

[24] See, World Book Encyclopedia, Vol. 4, World Book Inc., pages 940-941 (2003).

to impose its views on the judicial appointments. James Dobson and others have vowed to take their revenge on those political leaders who do not appoint judges with "family values."

It should be clear, when the Ohio State Supreme Court says that taking a child to one of these churches is suspicious and shows sexual motivation to commit a crime, this is an outright attack against this kind of church.

The United Church of Christ that is characterized as a "gay" church is just like churches throughout the Country that believe in the Trinity. People go there to worship, change their lives physically and spiritually. They believe in the moral code of the Bible that teaches the Golden Rule. People take children to these churches to help the children develop moral principles of good behavior to change their lives by growing physically and spiritually. The simple fact that there are gay people in the world that attend these churches should not make them suspicious. Nor the fact that these churches teach that even if you are a homosexual you can lead a happy virtuous life.

Within the Ohio State Supreme Court, the Justices reasoned it does not matter if you are gay or straight, it's these churches that are suspicious.

Ruling that a certain kind of church is a suspicious place is according to law a breach of the First Amendment by the government becoming entangled in a religious controversy, by their lack of neutrality within the controversy and by their openly hostile attitude toward the "gay" church.[25]

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[25] See, *Epperson v. State of Arkansas*, 393 U.S. 97, 89 S.Ct. 266 (1968); and *Lemon v. Kurtzman*, 91 S.Ct. 2105 (1971).

The Ohio State Supreme Court gives the reason for the church to be a suspicious place being that the church desensitizes children to homosexuality and this desensitization leads to pedophilia.

Not only do they present such information within court, but they do so in open disregard for the intent of the trial judge's ruling.

It was the purpose of the State to prove Crotts' guilt based on indirect evidence that he was gay. "No direct evidence that Crotts is gay was admitted." The blatant disregard for intent within the law is obvious. It was the intention to exclude evidence that Crotts was gay. To include such evidence indirectly shows that the Ohio Supreme Court believes in breaking the law indirectly and doing so with foresight and planning. The very fact that the Justices know that it was the intent of the prosecutor to enter the information into the record indirectly was enough to prove that the prosecutor was promoting an environment that was not impartial.[26]

The ruling of *Church of God v. Amarillo Independent School District*[27] pertains to this case. It is not only overt discrimination but also practices that are in form but discriminatory in operation. If purpose or effect of a ruling is to impede observance of one or all religions or is to discriminate between religions, that law is unconstitutionally invalid even though burden may be characterized as being only indirect.

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[26] See, *Abington School District v. Schempp*, 83 S.Ct. 1560 (1963).

[27] See, *Church of God (Worldwide, Texas Region) v. Amarillo Independent School District*, 511 F.Supp. 613 (1981).

It may be argued by the State that there is some kind of "secondary effect" of taking a child to a church that accepts homosexuality as in *Renton v. Playtime Theaters, Inc.*[28] But for the same reason that presenting evidence that Crotts is a homosexual and therefore has a propensity to pedophilia is prohibited so too the argument from a "secondary effect" of the environmental effects of taking a child to a church that accepts homosexuals is prohibited. It is not reasonable to conclude that simply exposing a child to homosexual ideas leads to pedophilia. No more than exposing a child to heterosexuality would prevent a child from growing up to be a homosexual.

This is a stereotype that the courts give as a reason to exclude evidence that Crotts is a homosexual.

Furthermore, no one ever argued that pedophilia involving a male and a young female is caused by desensitization taught by a church or an environment that teaches adult heterosexuality. Thus, a man should be prohibited from taking young girls to church because of the secondary effect.

The government may not compel affirmation of religious belief, punish expression of a religious belief, punish expression of a religious doctrine it believes to be false, impose special disabilities on basis of religious views or religious status or lend its power to one or the other side in controversies over religious authority or dogma.[29]

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[28] See, *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986).

[29] See, *Resources of Oregon v. Smith*, 110 S.Ct. 1595 (1990).

Even though the granting of this Writ may lead to a new trial, by bringing witnesses to testify in court again, these witnesses are no longer children, nor can their testimony be as easily coerced or modified by family, friends and prosecutors. Crotts is simply asking for a trial that is impartial and not manipulated by a prosecutor who presents erroneously admitted evidence and then further mischaracterizes the facts, as stated by the appellate court.[30]

In *Elkins v. United States*,[31] the primary purpose of the exclusionary rule "is to deter – to compel respect for the constitutional guarantee in the only effectively available way – by removing the incentive to disregard it."

Therefore, this so-called evidence that violated Crotts' rights cannot be used against him. And his First, Sixth and Fourteenth Amendment rights must be upheld.

When the court first applied the rule in *Mapp* to the State court prosecutions it reasoned, "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its existence."

This is the great American test of leadership to be opposed to an idea yet affirm your adversaries right to it.

The voices of the great men who founded this Country speak out that this Writ must be granted. Madison, Jefferson, Lincoln, Emerson, Charles Finney and Martin Luther King cry out, protect this man's liberty. Stand up

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[30] See, Appendix C, page 19.

[31] See, *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 1453 (1960).

to those who wish to impose their religious views on others. Liberty, Fraternity, Virtue and the pursuit of happiness are for all Americans.

Don't let Jerry Falwell, Pat Robertson, James Dobson or Bob Jones stop you from singing with the churches that accept gays. America, America, God shed his grace on thee and crown thy good with brotherhood from sea to shining sea.

Respectfully submitted,

STEVEN CROTTS #430-972
1150 North Main Street
P.O. Box 788
Mansfield, Ohio 44901-0788
Petitioner, *Pro Se*

820 N.E.2d 302
104 Ohio St.3d 432

APPENDIX A

Supreme Court of Ohio.
The STATE of Ohio, Appellant,
v.
CROTTS, Appellee.
No. 2003-1161.

Submitted Sept. 15, 2004.
Decided Dec. 15, 2004.

O'CONNOR, J.

{¶ 1} Steven Crotts was arrested on January 16, 1999 following a police investigation of an alleged sexual assault occurring at his home. The victim, 12-year-old "J," alleged that he and his twin brother, "B," had shoveled snow at Crotts's residence on January 15. After Crotts paid the boys for shoveling snow, they attended an Awana church event with him. Following the event, they rented videos to watch at Crotts's home. The twins intended to spend the night there. After preparing dinner for the boys, Crotts fixed a plate for J, while B fixed his own plate. While the boys watched videos over dinner, Crotts also brought a glass of root beer into the living room for J to drink, while B poured his own. J and B reported that Crotts offered them a white pill, later determined to be melatonin, telling them it would help them sleep better and live longer. Both boys refused to ingest the pills, instead putting the pills in their pockets.

{¶ 2} B testified that J fell asleep unusually early that night. J recalled feeling woozy and falling asleep on the couch. He recalled being carried up the stairs at some point; he remembered seeing two white hands, Crotts's

face, and a pair of glasses. J did not recall protesting. J believed that Crotts had somehow managed to slip him the white pill to make him drowsy.

{¶ 3} J woke up the next morning in Crotts's bedroom on top of Crotts. J was naked except for his socks. Crotts was also naked. J stated that when he awakened, he was facing the appellant in a "riding position" and felt his penis rubbing against Crotts's penis. He felt Crotts's hands on his buttocks, moving him up and down. J also noted that both his penis and Crotts's penis were erect and lubricated with oil. J yelled at Crotts to get off him and attempted to climb off the bed. Crotts smiled and said to him, "I know what you're doing," and grabbed J by the wrists. When J finally managed to get off the bed, he felt a wet substance in his pubic area. He put on his shorts and ran downstairs, where he awakened his twin brother, yelling, "Steve was trying to rape me – he was trying to do something to me." J called the police.

{¶ 4} The twins' older brother, 16-year-old P, worked for and resided with Crotts. P never paid rent to Crotts; while he was living there, Crotts took pictures of P and his friend in risqué poses that Crotts printed with the captions "C'mon 'n' Lick Me" and "Sisters for Life." P testified that he and a male friend returned to Crotts's home in the early morning hours of January 16, 1999 and saw his younger brother B sleeping on the couch alone. P and his friend went upstairs to go to sleep. They were awakened several hours later by sounds of a commotion in the house. Two officers came into his bedroom with their guns drawn. P heard J saying, "Not in there, in here," and heard the shower running. P remained in his room until after Crotts was taken to the police station. He and his friend later left the residence at the order of the police.

{¶ 5} J and B were taken to the police station, where they were interviewed. J was then taken to the hospital and a rape-kit examination was performed. The examining doctor, Cary Scott, noted the presence of an emollient on J's body, which may have been olive oil. Dr. Scott noted no signs of trauma or physical evidence of molestation on the victim; however, Dr. Scott also noted that a lack of findings was not uncommon if a lubricant had been used or there was no forced penetration.

{¶ 6} The Bureau of Criminal Identification and Investigation ("BCI") performed a chemical analysis of the white pill that B had turned over to police. Forensic scientist Jeffrey Houser determined that the white pill was melatonin, a dietary supplement. No tests were performed to determine if melatonin had been ingested by J. The BCI report also contained the results of tests performed to find physical evidence on J's shorts. The report indicated the presence of sperm from J but found no evidence of sperm or DNA from Crotts.

{¶ 7} Crotts denied the allegations made against him. He asserted that he was awakened on the morning of January 16, 1999 by someone throwing shoes at him. He ignored it and tried to go back to sleep, but one of the twins – he couldn't tell which one – appeared at his bedside with a bottle of oil in his hand, poised to pour the oil on him. Crotts became angry and pushed the boy against the wall. The boy spilled the oil against the wall, further angering Crotts, and the boy ran out, still carrying the bottle. A few minutes later, one of the twins came into the room, tried to pull the sheet off Crotts, and again attempted to pour olive oil on him. Crotts grabbed the boy's arm, twisted it, and the boy fell to the ground. Crotts was naked at the time. He told the boy to give him the oil or he

was going to "beat [him] like [his] father does." The boy ran downstairs, yelling that he was going to sue Crotts. Crotts stayed in bed a little longer and then got up and took a shower. The next thing he knew, he heard police telling him to get out of the shower.

{¶ 8} Crotts was convicted of one count of kidnapping with a sexual-motivation specification and two counts of gross sexual imposition, with each of the latter two counts carrying a specification that the victim was under 13 years of age. Crotts was adjudicated to be a sexual predator.

{¶ 9} The appellate court reversed the convictions because it found certain testimony and evidence to be inadmissible "other acts" evidence. The evidence found offensive by the appellate court included (1) victim testimony that Crotts had photographs of nude juveniles and adults on his computer, (2) testimony that Crotts took the victim and his brother to an "all gay" church, (3) testimony that Crotts attended a second church catering to the gay community, (4) a photograph of P and a male friend, which Crotts had captioned "Sisters for Life," (5) a second photograph, captioned "C'mon 'n' Lick Me!," of the same friend unclothed, partially covered by a sheet, and (6) testimony from P that he had "personal experiences" with Crotts that "would make [him] believe he's guilty * * * ."

{¶ 10} We will begin by examining the admissibility of the first five items of evidence. The opinion testimony will be addressed separately. The state argues that the evidence listed in (1) through (5) above was properly admitted under Evid.R. 404(B) to demonstrate Crotts's intent, motive, and plan. The appellate court found that this evidence could not be used to show Crotts's intent because "Crotts denied the acts, not their alleged purpose."

The court reasoned, "[I]f the State could prove the acts occurred as alleged, Crotts's intent would not be in dispute." The court also stated that the above-mentioned evidence, though purportedly offered to show intent, plan, or motive, actually goes solely to Crotts's propensity to commit the crime and was admitted in violation of Evid.R. 404(B).

{¶ 11} The appellate court dismissed the state's argument that the evidence shows Crotts's plan to desensitize the victim and his brothers to pedophilia in order to facilitate his sexual advances, opining, "The inference of a plan can be made only if one first infers that Crotts is homosexual, that he, therefore, is attracted to minors, and that he employed boys in his businesses as a means of gaining access to them. Not only are these inferences invalid, they can only be made after one has made the forbidden inference of propensity." (Footnote omitted.)

{¶ 12} We must note that the modern understanding of pedophilia is that it exists wholly independently from homosexuality. The existence or absence of one neither establishes nor disproves the other. "The belief that homosexuals are attracted to prepubescent children is a baseless stereotype." *State v. Bates* (Minn.App.1993), 507 N.W.2d 847, 852. Thus, evidence of homosexuality is not relevant to establish pedophilia. Id. We are forced to state the obvious because of the reckless and bald assertion by the appellate court that the prosecutor argued, and the jury believed, that because Crotts is homosexual, he therefore is also a pedophile. Fortunately, the appellate court is mistaken. Neither the prosecutor nor the trial judge was that obtuse. In fact, on the eve of trial, the trial judge warned the prosecution to be very careful in its treatment of the issue:

{¶ 13} "[T]he State is to be very clear that [Crotts's] homosexuality cannot be used in a manner of prejudice against the defendant.

{¶ 14} " * * * The Court may even on its own, step in if the Court feels that way and I will be watching for that.

{¶ 15} " * * * I do want to severely caution [the prosecution] that this Court is not going to have homosexuality as the focus of the trial.

{¶ 16} "I'm not going to allow the jurors to cast their verdict based on homosexuality."

{¶ 17} The prosecutor did not argue that Crotts abused J because Crotts is homosexual. Rather, the prosecutor argued that over the course of time, Crotts attempted to condition J and his brothers to accept pedophilia as appropriate conduct. The state argues that the controverted evidence was used to support this legitimate argument. The question we must answer is whether the appellate court erred when it ruled that the trial court had abused its discretion by admitting the evidence to be used for this purpose.

{¶ 18} Generally, extrinsic acts may not be used to suggest that the accused has the propensity to act in a certain manner. Evid.R. 404(B); *State v. Smith* (1990), 49 Ohio St.3d 137, 140, 551 N.E.2d 190. However, there are exceptions. Evid.R. 404(B) allows such evidence where it is offered to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Even more relevant is R.C. 2945.59, which provides, "In any criminal case in which the defendant's motive or intent * * * is material, *any acts of the defendant* which tend to show his motive or intent, the absence of mistake

or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant." (Emphasis added.) The defendant's motive in this case is absolutely material, as he was charged with kidnapping with a sexual-motivation specification.

{¶ 19} Neither R.C. 2945.59 nor Evid.R. 404(B) "requires that the other act be 'like' or 'similar' to the crime charged, as long as the prior act tends to show one of the enumerated factors." *State v. Shedrick* (1991), 61 Ohio St.3d 331, 337, 574 N.E.2d 1065. The appellate court stated that proof of Crotts's plan is immaterial if the state establishes that the defendant committed the acts charged. While this statement is tautologically true, the standard for admitting other-acts evidence is not whether the evidence is necessary to prove an element of the offense. Rather, the issue is whether the evidence "tend[s] to show" motive, plan, or intent.

{¶ 20} The appellate court's assertion that the state did not need to prove Crotts's motive, intent, scheme or plan to prove that he committed the charged offenses was misguided in several ways. First, it is not true in this case. In order to prove the sexual-motivation specification to the kidnapping count, the state needed to prove motivation. See R.C. 2971.01(J) and (K). Second, even if the statement were true, it does not follow that evidence establishing motive, intent, scheme, or plan is immaterial. Such evidence is always material because it tends to show why one version of events should be believed over another.

{¶ 21} In this case, the trial court aptly limited the evidence to protect the defendant. The trial court excluded from evidence any testimony regarding whether Crotts is homosexual or has AIDS. It also excluded testimony that Crotts walked around his house naked in the presence of juveniles and had a sexual relationship with P. The trial court excluded evidence that Crotts exposed J to pornography and sexual devices. The court severed this case from charges that Crotts sexually abused J's twin brother. The trial court also sustained an objection when the prosecutor asked P the meaning of "Sisters for Life." Likewise, the court prevented P from testifying that he witnessed Crotts "lie[ ] about his health" to a sexual partner, in the apparent belief that it would lead the jury to speculate about Crotts's HIV status. The photos of P and his friend were admitted only to show that Crotts was indeed sexually attracted to young boys. Even so, the court carefully limited this evidence that Crotts was attracted to minors out of concern that cumulative evidence of this nature would be prejudicial. J's testimony that he viewed child pornography on Crotts's computer is consistent with the state's desensitization theory of the case. The trial court's careful stewardship of this sensitive evidence demonstrated a skillful application of the evidentiary rules and fell well within her realm of discretion.

{¶ 22} The remaining controverted evidence took the form of witness testimony, which by its very nature cannot always be curtailed in advance. Two of the statements described Crotts's introduction of the boys to what one of them called an "all gay" church and to a second church that was characterized as gay-friendly. The state offered this testimony as an element of its theory that Crotts exposed J to sex through photos, movies, casual nudity,

and environment to desensitize him to man-boy sexual relationships. One of the environmental factors happened to be exposure to homosexuality. The trial court recognized that homosexuality does not equate with pedophilia. However, it also found that the state's theory was not unreasonable. Thus, the jury was permitted to weigh this evidence. Crotts argues that this statement prejudiced him by implying that he is homosexual, leading the jury to convict him based upon his homosexuality.

{¶ 23} As a legal term, "prejudice" is simply "[d]amage or detriment to one's legal rights or claims." Black's Law Dictionary (8th Ed.1999) 1218. Thus, it is fair to say that all relevant evidence is prejudicial. That is, evidence that tends to disprove a party's rendition of the facts necessarily harms that party's case. Accordingly, the rules of evidence do not attempt to bar all prejudicial evidence – to do so would make reaching any result extremely difficult. Rather, only evidence that is *unfairly* prejudicial is excludable.

{¶ 24} "'Exclusion on the basis of unfair prejudice involves more than a balance of mere prejudice. If unfair prejudice simply meant prejudice, anything adverse to a litigant's case would be excludable under Rule 403. Emphasis must be placed on the word 'unfair.' Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision. Consequently, if the evidence arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial. Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect.'" *Oberlin v. Akron Gen. Med. Ctr.* (2001), 91 Ohio St.3d 169, 172, 743 N.E.2d

890, quoting Weissenberger's Ohio Evidence (2000) 85-87, Section 403.3.

{¶ 25} Because fairness is subjective, the determination whether evidence is unfairly prejudicial is left to the sound discretion of the trial court and will be overturned only if the discretion is abused. *State v. Robb* (2000), 88 Ohio St.3d 59, 68, 723 N.E.2d 1019. The unfairness that the appellate court found here apparently was the danger that the jury would presume that Crotts was guilty if it learned that he is homosexual. Although we would be reluctant to overturn this ruling had it been made by the trial court, the court of appeals failed to articulate why the trial court acted outside its discretion when it concluded that the limited references to "all gay" and gay-friendly churches was not prejudicial. The appellate court simply substituted its judgment for that of the trial court without demonstrating that the lower court abused its discretion.

{¶ 26} The trial court granted Crotts's motion to exclude evidence that he is homosexual. No direct evidence that Crotts is gay was admitted. Testimony that Crotts took the children to allegedly homosexual churches does not lead so inexorably to the conclusion that he is homosexual that admission of such testimony was an abuse of discretion. Theoretically, testimony that a heterosexual male took children to a homosexual church would be more supportive of the state's theory that it was done for the purpose of desensitizing J, because a straight male would have less reason to attend a gay church, and his motive for taking a child there would be that much more suspicious.

{¶ 27} The final controverted testimony was that P testified during redirect, "Well, I have had personal experiences with the defendant that would make me

believe he's guilty, but I've also known my brothers all their lives and heard their lies, so it's kind of a lose/lose situation." In its opinion, the appellate court quoted only the first half of this statement. The qualification that follows the "but" minimizes the effect of the first clause. It is not clear to us why the sentence, taken as a whole, should be excluded. Lay witness opinion testimony is permitted where it is "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue." Evid.R. 701. Opinion testimony is not excludable "solely because it embraces an ultimate issue to be decided by the trier of fact." Evid.R. 704. This was ultimately a case of credibility. J told one version of events, and Crotts told another. Testimony expressing an opinion on whose version is more likely to be true would certainly aid the jury in reaching its conclusion. "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but * * * the evidence may refer only to character for truthfulness or untruthfulness * * *." Evid.R. 608(A). P's testimony was directed to Crotts's character for untruthfulness. And since P portrayed his brothers as habitual liars virtually in the same breath, Crotts's claims of unfair prejudice must lose what little force they otherwise might have had.

{¶ 28} The court of appeals erred in reversing the conviction, and its judgment is reversed. The cause is remanded to the appellate court to address the assignments of error it found to be moot under App.R. 12(A)(1)(c).

Judgment reversed
and cause remanded.

MOYER, C.J., RESNICK, LUNDBERG STRATTON and O'DONNELL, JJ., concur.

PFEIFER, J., concurs in judgment only.

F.E. SWEENEY, J., dissents and would dismiss the appeal as improvidently allowed.

APPENDIX B

The Supreme Court of Ohio

State of Ohio,
Appellant,
v.
Steven Crotts,
Appellee.

Case No. 03-1161

RECONSIDERATION ENTRY

Cuyahoga County

(Filed Feb. 16, 2005)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Cuyahoga County Court of Appeals; No. 81477)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX C

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 81477

STATE OF OHIO,	:	CA02081477
Plaintiff-Appellee	:	15842267
vs.	:	JOURNAL ENTRY
STEVEN CROTTS,	:	AND
Defendant-Appellant	:	OPINION
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	MAY 15, 2003
	:	CA02081477
	:	15926479
CHARACTER OF PROCEEDING	:	Criminal appeal from Common Pleas Court
JUDGMENT	:	Case No. CR-4066396
DATE OF JOURNALIZATION	:	REVERSED AND REMANDED
	:	

(Filed May 27, 2003)

APPEARANCES:

For Plaintiff-Appellee:

WILLIAM D. MASON
Cuyahoga County Prosecutor
FARIS ASAD
Assistant County Prosecutor
The Justice Center-8th Floor
1200 Ontario Street
Cleveland, Ohio 44103

For Defendant-Appellant: DAVID L. DOUGHTEN
The Brownhoist Building
4403 St. Clair Avenue
Cleveland, Ohio 44103

ANNE L. KILBANE, P.J.:

This is an appeal from a conviction and sentence entered by Judge Kathleen A. Sutula after a jury found Steven Crotts guilty of one count of kidnapping[1] and two counts of gross sexual imposition,[2] all concerning a male victim under the age of thirteen. Crotts claims, inter alia, that the charges against him failed to ensure juror unanimity on the facts that constituted the kidnapping and that it was error to admit other "acts" evidence in order to prove his character. We reverse and remand.

From the record we glean the following: On January 16, 1999, then thirty-eight year old Crotts was arrested after police investigated an alleged sexual assault at his home on Lee Road in Maple Heights. The twelve year old victim alleged that he had stayed overnight at the house and awakened to find Crotts molesting him. The victim's twin brother had also stayed overnight and their older brother P., then sixteen years old, was present when the police arrived because he was employed by Crotts and lived there. At trial the victim testified that he and his twin brother had attended an "Awana"[3] church event with Crotts on the night of January 15, 1999, later rented videos, went to Crotts's home and watched the videos

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[1] R.C. 2905.01.

[2] R.C. 2907.05.

[3] According to a police officer who testified for the State, "Awana" is a Christian boys' club comparable to the boy scouts.

while eating dinner and that the victim fell asleep early after Crotts gave him a melatonin tablet. He testified that he woke briefly when he became aware that he was being carried upstairs, but fell back to sleep until morning when he awoke in Crotts's bed. He stated that he was naked and lying on top of Crotts, who was also naked, that Crotts was "humping" him, and that he felt a "wetness" on his body. The boy stated that he tried to get away but Crotts grabbed his wrist and continued. He escaped Crotts's grasp and ran downstairs, where he awakened his twin brother and called the police.

In addition to police investigators and an expert medical witness, three of the victim's brothers also testified; the victim's twin and P., who were in Crotts's house at the time of the incident, and A., another brother employed by Crotts for jobs around his house or in his businesses as a hot dog vendor at fairs and school portrait photographer.

Crotts testified that on the morning of January 16th the victim woke him up by throwing shoes at him, and then began pouring olive oil on him and spilling it on the carpet. He stated that he grabbed the child, took the oil away from him, and threatened, if he didn't behave, to "beat you like your father does." He claimed that the boy ran downstairs and threatened to sue him. A police officer testified that Crotts told him that the child's story was a "ploy * * * to get money from him."

The jury found Crotts guilty of kidnapping with a sexual motivation specification and two counts of gross sexual imposition, and he was sentenced to five years each on the counts of gross sexual imposition, concurrent with each other but consecutive to an eight year prison term for

kidnapping. The judge also determined that Crotts was a sexual predator.[4]

I

Crotts's first and fifth assignments of error raise the same issue and can be addressed together. In his first assignment he claims that his kidnapping conviction is invalid because the jury was not required to reach a unanimous verdict on the facts that constituted the kidnapping, and in his fifth assignment he argues he received ineffective assistance of counsel because his lawyers failed to raise the issue. We review an ineffective assistance claim to determine whether the lawyer's conduct was within professional standards and whether there is a reasonable likelihood that the outcome would have been different absent the error.[5]

Crotts claims the kidnapping conviction cannot stand because the State argued alternatively that the kidnapping occurred: (a) when he carried the victim upstairs; or (b) when he grabbed the victim's wrist to prevent him from escaping. He argues that the jury should have been required to reach a unanimous verdict upon the facts that constituted the kidnapping, and the verdict is not unanimous because there is a chance that some jurors found him guilty for carrying the child upstairs while others found him guilty for grabbing his wrist.

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[4] R.C. Chapter 2950.

[5] *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Johnson*, 88 Ohio St.3d 95, 108, 2000-Ohio-276, 723 N.E.2d 1054.

While a jury must reach a unanimous verdict upon each element that makes up a crime, it "need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element[.]"[6] Where an element can be accomplished by alternative means, the jurors need not agree on which means the defendant used so long as they agree that the element is satisfied.[7] Crotts was charged with kidnapping under R.C. 2905.01(A)(4), which states:

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

* * *

(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]"

Pursuant to *Richardson*, we must construe the statute to determine whether the jury chose between alternative means of completing the same element or between separate elements. The first element of kidnapping expressly appears to state a number of means to complete the same offense, as the defendant can use force, threat, deception or, in the case of a victim under age thirteen, "any means" to remove or restrain the victim. The second set of alternatives

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[6] *Richardson v. United States* (1999), 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (citations omitted).

[7] Id. at 817-818.

is at issue here, however, as the jury was allowed to convict either on evidence that Crotts "removed" the victim when he carried him upstairs or on evidence that he "restrained" the victim when he grabbed him by the wrist. We must determine whether these alternatives constitute different means of committing the same offense or are elements of separate offenses.

Although the Supreme Court's decisions in *Richardson* and *Schad v. Arizona*[8] indicate some continuing controversy in this area, we believe the determination between "means" and "elements" should be at least consistent with the methods of determining whether two offenses are included or allied for purposes of the charge or punishment. These determinations each require analysis of abstract elements[9] to decide whether an offense is included in the charging instrument or whether the legislature authorized multiple punishments for two offenses that arise from the same set of facts. If one determines that a defendant faces multiple punishments for two offenses because they contain separate elements, that same determination should apply when deciding whether the methods of committing an offense constitute separate elements or are merely means of committing a single element. For example, if the offense of abduction is not allied with kidnapping because abduction cannot be committed by deception,[10] then one must conclude that the methods of force, threat, or deception do not constitute

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[8] (1991), 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555.

[9] *State v. Rance*, 85 Ohio St.3d 632, 637, 1999-Ohio-291, 710 N.E.2d 699.

[10] See *State v. Fleming* (1996), 114 Ohio App.3d 294, 297-298, 683 N.E.2d 79.

separate means of the same element, but are separate elements that must be specified in a charging instrument or bill of particulars and upon which a jury must unanimously agree.

The difficulty with the current state of allied offense analysis is that it too often fails to distinguish between alternative means and separate elements, and instead treats every alternative as a separate element regardless of its character. Because of this approach very few statutory offenses can be viewed as allied and multiple punishments are favored.[11] If each alternative is considered a separate element, however, very few offenses can be considered included for purposes of charging instruments or jury instructions, and consistency would demand that the alternatives be considered separate elements for purposes of jury unanimity as well. The existence of a particular fact should not be considered an "element" for one purpose and a "means" for another, because it would be unfair to allow multiple punishments for offenses containing "elements" that are not required to be specified in an indictment or separately considered by a jury.[12]

When viewed in light of the consequences for other determinations, we conclude that removal and restraint are separate means of completing a single element of a kidnapping, that element being a restriction of the victim's

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[11] *Rance*, supra; see, also, *State v. Richey*, 64 Ohio St.3d 353, 369, 1992-Ohio-44, 595 N.E.2d 915 (felony murder and underlying felony are not allied because statute lists nine separate predicates).

[12] See *Schmuck v. United States* (1989), 489 U.S. 705, 717-718, 109 S.Ct. 1443, 103 L.Ed.2d 734 (indictment does not charge offenses that are not included, and defendant is not entitled to jury instruction unless offense is included).

freedom. Removal to another location is, in fact, simply a variant on the restraint of liberty. Determining otherwise would allow the State to charge and punish Crotts with two counts of kidnapping based upon the separate acts of removal and restraint claimed here, even though both acts are associated with a single alleged purpose.

Our decision here is consistent with the decision in *Whalen v. United States*,[13] in which the United States Supreme Court determined that multiple punishment analysis should consider the existence of statutory alternatives.[14] While this decision conflicts with the analysis used in *Rance* and *Richey*, supra, *Whalen* and *Richardson* provide a framework for consistent application of these principles that satisfies constitutional standards of due process and double jeopardy.[15] Therefore, the jury was required to find unanimously on the element of restraint, but it did not need to find unanimously on whether the restraint was accomplished by carrying the victim upstairs or grabbing his wrist when he tried to escape. The first and fifth assignments are overruled.

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[13] (1980), 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715.

[14] Id. at 694.

[15] Consistency, however, may not be the only constitutional requirement when a number of separate underlying offenses can be used as alternatives in proving a greater offense, as in *Rance, Richey,* and *Whalen*. In such cases the underlying offenses should be considered means for purposes of multiple punishment and lesser included offense analysis because they are predicates that show a single element of mens rea. *Schad*, 501 U.S. at 644. Nevertheless, the elements of the predicate felony require specificity in charging and juror unanimity because each represents conduct that is itself a violation of law. *Richardson*, 526 U.S. at 818-819.

II

In his second assignment Crotts claims the kidnapping conviction is invalid because the evidence was insufficient to sustain the element of restraint. We address the sufficiency of the evidence to determine "whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."[16] A sufficiency challenge presents a question of law and does not allow the reviewing court to weigh the evidence.[17]

Crotts argues that the failure to require jury unanimity means his conviction must be reversed because the evidence was insufficient to satisfy either of the alternative means. Although we note that in these circumstances there is a question whether a sufficiency challenge can prevail if the evidence fails to establish one of the alternative means, we need not answer it here. The victim testified that he was carried upstairs, that he awoke in Crotts's bedroom, and that Crotts restrained him by grabbing his wrist when he tried to escape the bedroom. This testimony, if believed by the jury, is sufficient in itself to satisfy either means of completing the restraint element. As noted, witness credibility is an issue going to the weight of evidence, not its sufficiency.[18] The second assignment is overruled.

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[16] (Emphasis sic.) *State v. Stallings*, 89 Ohio St.3d 280, 289, 2000-Ohio-164, 731 N.E.2d 159, quoting *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560.

[17] *State v. Martin* (1983), 20 Ohio App. 172, 175, 20 OBR 415, 485 N.E.2d 717.

[18] Id.

III

The third assignment challenges "other acts" evidence admitted during trial under Evid.R. 404(B). Although the judge bifurcated the trial to exclude evidence that concerned a separate incident with another alleged victim and sustained a number of objections to evidence of other acts, she allowed the State to present evidence that suggested Crotts was homosexual and had an attraction to minor boys. Over objections, the judge: (1) allowed the victim to testify that he saw pictures of "naked boys" and "nude people" while playing with Crotts's computer; (2) allowed the victim's twin to testify that they attended the Awana group at an "all gay church"; (3) allowed the twin to testify to an incident in which Crotts allowed and participated in wrestling matches at his home;[19] (4) allowed P. to testify that Crotts went to another church or temple that was rented to the "gay community"; (5) allowed the introduction of two photographs found in Crotts's home, one of P. and his friend, "C.", fully clothed but bearing the caption "Sisters for Life," and one of C. unclothed but with a sheet that covered his genitals and part of his torso and bore the caption, "C'mon 'n' Lick Me!"; and (6) allowed P. to testify that "I have had personal experiences with the defendant that would make me believe he's guilty[.]"[20]

Evid.R. 404(A) states that, with certain exceptions not applicable here, "[e]vidence of a person's character or a

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[19] Although objected to at trial, Crotts has not challenged this evidence on appeal.

[20] Although Crotts challenges this statement in his fourth assignment of error, which claims the judge erred in allowing the prosecutor to question P. concerning his brother's credibility, his response to the question is more aptly addressed under this assignment.

trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" Evid.R. 404(B) prohibits evidence of specific acts if offered for the same purpose, but allows such evidence if offered for another purpose, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." While we review the judge's rulings for abuse of discretion,[21] that discretion is subject to the strict construction of Evid.R. 404 against admitting character evidence.[22] Moreover, while discretion exists to weigh evidence and interpret facts, a judge has no discretion to make an error of law.[23]

Although the judge did not explain the rationale for all her rulings, she ruled that some of the evidence was admissible because the sexual motivation specification and the gross sexual imposition charges each contained an element of "sexual gratification," based on the definitions of "sexual contact" in R.C. 2907.01(B) and "sexual motivation" in R.C. 2971.01(J). Therefore, she stated that she would admit evidence "in order to satisfy the element of showing what types of things gratify this particular defendant in a sexual fashion." The State argues that the evidence was admissible for a number of purposes, including to show Crotts's sexual motive or intent, lack of mistake, and plan.

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[21] *State v. Lowe*, 69 Ohio St.3d 527, 532, 1994-Ohio-345, 634 N.E.2d 616.

[22] Id. at 533; *State v. Broom* (1988), 40 Ohio St.3d 277, 533 N.E.2d 682, paragraph one of the syllabus.

[23] *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 89, 52 0.0.2d 376 [sic], 262 N.E.2d 685; *Cooter & Gall v. Hartmarx Corp.* (1990), 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359.

Evidence of other acts is admissible if relevant for these purposes, which means not only that the other acts must be probative of motive, intent, lack of mistake, or plan, but that the claimed purposes must themselves be in dispute.[24] Therefore, we can immediately dispose of the State's "lack of mistake" argument because Crotts did not raise such a defense. A mistake argument admits claimed acts but denies the existence of mens rea or claims mitigation.[25] Although the State argues that other acts evidence was relevant to show Crotts's intent at the time he carried the victim upstairs and engaged in sexual contact with him, Crotts denied the acts, not their alleged purpose. Even though the prosecution cross-examined Crotts concerning whether any of his acts could have been mistaken for sexual advances, this is not the equivalent of a defendant raising the defense himself.[26]

Even if the prosecution could manufacture an issue in dispute by claiming that it must prove all elements of the offense,[27] analysis of evidence under Evid.R. 404 is not complete until the judge balances its probative value against its unfairly prejudicial effect.[28] Judges must be careful to ensure that claimed purposes under Evid.R. 404(B) are indeed relevant and not merely a mask to allow the evidence to be used for its improper purpose.[29] Despite

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[24] *United States v. Brown* (C.A.9, 1989), 880 F.2d 1012, 1014-1015.

[25] Id. at 1015-1016.

[26] *Govt. of Virgin Islands v. Archibald* (C.A.3, 1993), 987 F.2d 180, 185-186.

[27] *State v. Smith* (1990), 49 Ohio St.3d 137, 141, 551 N.E.2d 190; but, see, *Thompson v. United States* (C.A.D.C., 1988), 546 A.2d 414, 422-423 (intent must be genuine issue, and not merely formal).

[28] *United States v. Clark* (C.A.6, 1993), 988 F.2d 1459, 1465.

[29] *Thompson*, 546 A.2d at 422; *Archibald*, 987 F.2d at 186.

the State's burden to prove all elements, certain elements become the focus of dispute based on the facts of any particular case. If the State could prove the acts occurred as alleged, Crotts's intent would not be in dispute. Regardless of whether the State could inject some marginal issue of intent, the evidence was far more dangerous as proof of the acts themselves than as proof of mens rea. Because there was no significant claim of mistake, the evidence was irrelevant to show the absence of mistake.[30]

The principles just expressed in analyzing the mistake issue are also relevant to understanding the remaining issues under Evid.R. 404(B). Because the absence of mistake ultimately implicates the issue of intent, the fact that intent was not a subject of real dispute also renders illegitimate any claim that Crotts's motive or intent to engage in the acts for a sexual purpose was genuinely at issue. Under the circumstances here, there would be no genuine dispute of intent if the State could prove the acts occurred as alleged. However, the State's arguments on the issue of motive or intent illustrate another dangerous misconception about the admissibility of other acts evidence. By arguing that Crotts's other acts were admissible to show his motive or intent in committing the acts charged here, the State is proposing an exception that would swallow the general rule that other acts are inadmissible to show the defendant's propensity to commit the acts alleged.

The State's argument and the judge's ruling essentially admit other acts evidence to show a defendant's motive or intent without recognizing that the inference of

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[30] Id. at 185-186.

motive or intent can only be drawn after one draws the inference of propensity.[31] In effect, the other acts evidence is used to show the defendant's propensity, and the inference of propensity is then used to infer motive or intent. This is exactly the type of purpose for which the evidence should be excluded, not admitted.

Evid.R. 404(B) prohibits evidence of other acts when used to show that the defendant "acted in conformity therewith." To be admissible under the exceptions to this rule, the evidence must be relevant for some other purpose. When the other purpose cannot be inferred without first inferring that the defendant acted in conformity with a character trait or propensity, the inescapable conclusion is that the evidence is being offered for the prohibited purpose. Evidence is admissible under Evid.R. 404(B) only if it is relevant for an admissible purpose, and only if that purpose can be inferred without first inferring the defendant's propensity.[32]

As already stated, a rule allowing intent or motive to be shown through an inference of propensity would render Evid.R. 404(B) irrelevant because all other acts would be admissible. "Propensity" is defined as "an intense and often urgent natural inclination"[33], while "motive" is defined as "something (as a need or desire) that causes a person to act."[34] The confluence of these definitions requires judges to

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[31] *Thompson*, 546 A.2d at 421; Park, Leonard & Goldberg, Evidence Law (1998) 172, Section 5.22.

[32] Id.; see, also, 1 Imwinkelried, Uncharged Misconduct Evidence, (Rev.Ed. 2001), 4-3, Section 4.01.

[33] Webster's New Collegiate Dictionary (1976) 923.

[34] Id. at 751.

pay particular attention to issues under Evid.R. 404 to ensure that evidence is not offered for a prohibited purpose. In legal terms, motive and intent are "situationally specific"[35] mental states, and evidence of a general propensity is not permitted to show the existence of those states.

When analyzing evidence under Evid.R. 404(B), one also should recognize that the exceptions admit other acts evidence for two primary purposes; to show intent or identity.[36] Therefore, the State's argument that the other acts were admissible to show a plan or scheme must be relevant to one of these purposes, and not as proof that Crotts committed the charged acts themselves. Again, because Crotts's intent would be shown by proof of the acts themselves, other evidence of his intent would be only minimally probative. Because the only disputed issue was whether the acts occurred, the danger of unfair prejudice far outweighed the evidence's value for a proper purpose, and it should have been excluded under Evid.R. 403(A).

Neither was the identity of the victim's assailant in dispute; Crotts did not raise this issue, and the evidence

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[35] *State v. Picklesimer* (Oct. 15, 1996), Pickaway App. No. 96CA2, citing Imwinkelried, at Section 3.15.

[36] Although the *Picklesimer* decision states that the evidence may be relevant to prove the charged acts or for res gestae purposes, there are few circumstances, generally referring to defenses of accident, where it can be shown that the charged act is being proven without resort to an inference of propensity. 1 Imwinkelried, at Section 4.01. Moreover, while not at issue here, the use of prejudicial other acts should be severely scrutinized when offered as inseparable context or background evidence. Such evidence, if proper, normally can be shown to have a specific purpose under Evid.R. 404(B) rather than being introduced for an unspecified res gestae purpose. See, e.g., *State v. Lowe*, supra, 69 Ohio St.3d at 531 (examples of res gestae also admissible as proof of opportunity or knowledge).

admits of no possibility that the victim mistakenly identified Crotts after being assaulted by someone else.[37] Therefore, while evidence of a plan may be relevant to prove identity, the same Evid.R. 403(A) and 404(B) analysis relevant to intent is relevant to identity as well.

Even if the issues of identity or intent were in dispute, the State's evidence of Crotts's "plan" to sexually assault the victim fails. The State argues that Crotts executed a plan to lure boys to his home with promises of employment and then "acclimate" them to his sexual advances by exposing them to his gay lifestyle. As with other evidence under 404(B), the existence of a plan must be inferred independently from an inference of propensity, and the State's argument cannot pass this test. The inference of a plan can be made only if one first infers that Crotts is homosexual, that he, therefore, is attracted to minors, and that he employed boys in his businesses as a means of gaining access to them. Not only are these inferences invalid,[38] they can only be made after one has made the forbidden inference of propensity.

When properly used, modus operandi evidence does not prove identity *through* the defendant's propensity. Where a murderer has cut off a victim's ear, evidence that the defendant previously committed a murder and cut off the victim's ear may be admissible[39] to show the murderer's identity through the existence of a modus operandi,

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[37] *Archibald*, supra.

[38] An attraction to juveniles cannot be inferred from the premise that one is homosexual, and an attempt to lure juveniles for sex cannot be inferred from their employment in low-wage jobs.

[39] Again, subject to Evid.R. 403(A).

despite the fact that the evidence also shows the defendant's propensity for murder and ear removal. The evidence is potentially admissible because the inference of identity does not arise from the inference of general propensity, but from the inference of commonality between specific events. Nevertheless, because the inferences of propensity and commonality can be confused, the standard for admitting modus operandi evidence requires a showing of a "behavioral fingerprint" so distinct that the evidence's purpose to establish identity is clear.[40] The inference of commonality must be so strongly probative of identity that it outweighs the unfairly prejudicial effect of the propensity inference.

Moreover, the phrase "behavioral fingerprint" reinforces the need for a disputed issue of identity, and the connection between the events must be so apparent that the commonality inference is distinct and independent from the propensity inference. Not only is the evidence here irrelevant unless first used to show propensity, the acts offered do not show any coherent plan because they are merely a hodgepodge of incidents wrapped in innuendo stemming from Crotts's sexual orientation.

Although it was error to admit character evidence for the purpose of showing that Crotts acted in conformity therewith, we must determine whether the errors were prejudicial. Where the error affects constitutional rights, it must be harmless beyond a reasonable doubt, while nonconstitutional error can be found harmless if substantial other evidence supports the conviction.[41] While the transcript here presents a compelling case for determining

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[40] *Lowe*, 69 Ohio St.3d at 531.

[41] *State v. Griffin* (2001), 142 Ohio App.3d 65, 79, 753 N.E.2d 967.

that the cumulative errors denied Crotts's constitutional rights to a fair trial,[42] we need not make such a determination because the evidence here does not support a finding of harmlessness under either standard.

The evidence showed significant inconsistencies among the statements the victim initially made to police and medical personnel, the statement he later gave to a defense investigator, and his testimony at trial. His twin brother's statements to police and to the investigator also contained inconsistencies, and there was no physical evidence to support the claim of sexual assault. The victim initially stated that Crotts assaulted him from behind, attempted to penetrate him anally, and that he used a ceremonial sword as a weapon or an accessory during the assault. The physical evidence, however, failed to support these allegations, and one could argue that the victim's testimony was modified to accommodate the conflicts. Moreover, there was other evidence in Crotts's favor, including testimony from the victim's brothers concerning his lack of credibility, and evidence that the victim's brothers maintained their relationships with Crotts after the incident.

In addition to the lack of evidence showing Crotts's guilt, the prosecution engaged in a number of tactics designed to introduce irrelevant or inadmissible evidence or to unfairly encourage the jury to speculate on excluded evidence. For example, despite the exclusion of certain evidence concerning Crotts's sexual orientation, the prosecution made repeated attempts to place that evidence before the jury, succeeding in some instances and casting

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[42] Id.

unmistakable innuendo in numerous others. Furthermore, the judge's admission of some evidence could have made her exclusion of other evidence the subject of even more speculation by the jury; while she excluded questioning whether P. and C. were homosexual, she nonetheless admitted the photo of them bearing the caption, "Sisters for Life." She also allowed the victim's twin to testify that the Awana group met at an "all gay" church and allowed P. to testify that Crotts attended a church that was rented to "the gay community."[43]

Finally, the prosecution mischaracterized certain facts that increased the prejudicial effect of the erroneously admitted evidence. The prosecution implied that the Awana group was some type of gay outreach program aimed at recruiting young boys for sex, although one of the police officers who testified on the State's behalf stated that the group is a legitimate Christian boys' club. The prosecution also implied that Crotts induced and orchestrated the photographs of P. and C., when P. testified that they requested the photos themselves.

The analysis of whether "substantial other evidence" supports a jury's verdict cannot proceed in a vacuum and, therefore, the standard must consistently relate to other examples of evidence and errors. For example, where the defendant has raised appropriate objections, the standard for showing prejudice (or its absence) should not exceed

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[43] It also seems that the prosecution's leading questions to the victim's twin might have yielded a mistaken response; it appears that the Awana group met at a church other than the one P. referred to as being rented by the gay community.

that necessary for establishing plain error.[44] The effect on the outcome, moreover, should not exceed the "reasonable likelihood" standard for showing prejudice in ineffective assistance of counsel cases, where it is necessary only to show "a probability sufficient to undermine confidence in the outcome."[45] Furthermore, the requirement of "substantial other evidence" should exceed that necessary to affirm a verdict against a manifest weight challenge, otherwise the recognition of error would have no specific remedy because all defendants can challenge manifest weight regardless of evidentiary errors.

While helpful in avoiding procedural inefficiency, the doctrine of harmless error should be employed judiciously lest this procedural tool become a weapon against defendants' substantive rights. In light of all these principles, the likelihood that the other acts evidence improperly affected the verdict cannot be ignored. The third assignment of error is sustained, and the remaining assignments are moot.[46]

Judgment reversed and remanded.

It is ordered that the appellant recover from appellee costs herein taxed.

It is ordered that a special mandate issue out of this court directing the Court of Common Pleas to carry this judgment into execution.

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[44] *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240.

[45] *Strickland v. Washington*, supra, 466 U.S. at 694.

[46] App.R. 12(A)(1)(c).

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, J., AND
TIMOTHY E. MCMONAGLE, J., CONCUR

/s/ [Illegible]
ANNE L. KILBANE
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

APPENDIX D

STATE)
) **SS: AFFIDAVIT OF**
COUNTY OF RICHLAND) **MICHAEL C. BROWN**

I, Michael C. Brown, having first been duly sworn and cautioned of the penalties for perjury, hereby deposes and says that the following statements are true and accurate to the best of my knowledge, belief and recollection.

If called upon by the court to testify, I was and I am prepared to testify to the truth of the facts that Ronnie Justice (whose case was severed and later dismissed) told me he made false allegations against Steve Crotts. This occurred while I was a Manager/Program Supervisor at Parmadale. Because I was not a licensed counselor or therapist, there is no confidentiality to the statements made to me by Ronnie Justice.

Ronnie Justice told me that he made false allegations against Steve Crotts. Ronnie Justice did this in order to please his mother. Because of religious and social reasons, Ronnie Justice's mother felt homosexuality desires her son had were the result of the child sinful nature. Ronnie Justice's mother felt by bringing her son to counseling services he could be cured of the homosexuality.

Mr. Crotts became a scapegoat so that Ronnie Justice could please his mother and get the attention and love he so craved.

Further Affiant Sayeth Naught.

/s/ Michael C. Brown
Michael C. Brown
P.O. Box 788
Mansfield, Ohio 44901

Sworn to and subscribed before me on this 19th day of April, 2005.

[SEAL] **JOHN O. BABAJIDE**
Notary Public State of Ohio
My Certificate Expires
May 15, 2006

John O. Babajide
NOTARY PUBLIC

APPENDIX E

IN THE COURT OF COMMON PLEAS

STATE OF OHIO
CUYAHOGA COUNTY

(Criminal Division)

No. CR-406396

STATE OF OHIO PLAINTIFF

vs.

STEVE A CROTTS DEFENDANT

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

May 25, 2005

[45] Q Stung?

A Yes.

Q What happened after that?

A I waited for my mother to get there because the police people were talking to my mother.

Q The police do – the when they were doing those tests, they run any other tests on you?

A Not that I remember.

Q How did you feel when they were doing that?

A I felt like I was scared or something. I don't know. I don't know how I felt. I don't know. They just like were there.

Q Okay. What was going through your mind after this incident happened?

A I hope this man don't have AIDS.

MISS JOHNSON: Objection.

A That is the whole –

THE COURT: Just a moment. Overruled.

Okay. Now, has this affected you in any way?

A Yes.

Q How has this effected you?

MISS JOHNSON: Objection.

THE COURT: Approach the bench just a moment.

[46] (Thereupon, a discussion was had between Court and counsel off the record at the bench, after which the following further proceedings were had in open court:)

THE COURT: Ladies and gentlemen, we're going to take a very short break. Get up and go to the juryroom and you'll be right back. No discussing the case with each other.

(Thereupon, the following proceedings were had out of the hearing of the jury.)

MISS JOHNSON: Your Honor, this might also be a good time to move for a separation of witnesses. I don't know who's in here but –

THE COURT: Would have been a good time earlier, but this is okay, too. Any witnesses in the courtroom?

MR. ASAD: I don't think there are any.

[47] MISS JOHNSON: All right.

THE COURT: Counsel, of course, are instructed to enforce that order since the Court doesn't know who the witnesses are.

Okay. Mr. Asad, would you kindly struck the witness now on the record.

MR. ASAD: Thank, you.

Mr. Brewer, you are instructed on the record that during your testimony you are not to bring out in any way that the defendant in this case is, A, homosexual, or B, that this defendant has AIDS or HIV?

THE WITNESS: All right.

MR. ASAD: You are also instructed on the record and I will ask you a question for the record, you are not to bring out prior sexual acts of the defendant.

Do you know – do you understand all this?

THE WITNESS: Yes.

MR. ASAD: Do you remember whether I have told you this before?

THE WITNESS: Yeah, you told me earlier today.

MR. ASAD: Thank you. Thank

* * *

[126] had a lot of scratch marks on me, on my legs, but it wasn't no blood. Just like I said. So when I first started thinking about it, I'm like I wasn't dragged into no bushes.

So I'm like, let me see. I'm like that leg, that blade he got up there, I mean like he must have. He must have did

it with the blade or whatever. Oh, yeah, when I woke up the blade was on the bed right next to us.

Q Your testimony here today is that you knew where the blade was, but you didn't see it that day?

A The lady police officer threw it on the bed. They picked it up. She picked it up off the floor and threw it on the bed.

Q Your testimony to Mr. Asad was that when he asked you, did you see that sword that morning and you said, no, but you knew where he kept it – he always kept it?

A Yes.

Q By the closet?

A Yes.

Q Isn't that right?

A Yes.

Q Now, did you – when you went downstairs did you wake your brother up or was he already awake?

* * *

[119] when you put them on –

A No.

Q – and the time that you called the police?

A No.

Q So if there was semen or sperm on your shorts, how would it have gotten there?

A I really – that is – that is what I was talking about to Mr. Asad about.

Q No. Just answer my question.

A I don't know.

Q Okay.

A I don't know how it got on there.

Q If it was yours, you still don't know how it got on there?

A No.

Q What is all this talk about State's Exhibit Number 1, that sword? He didn't do anything to you, even by your own testimony with State's Exhibit Number 1, did he?

A No. He ain't hit me or nothing with it.

Q He didn't do anything to you with it?

A No.

Q By your testimony here today, is that right?

A Yeah.

Q But at some other point you told some police

[120] officer that he scratched you with it?

A No. I told the police officer that when we was at the hospital I had scratch marks on my arms.

They wasn't deep, but I had scratch marks. I assumed he did it with that sword.

Q You assumed?

A Yes. I assumed he did it with the sword. That is what I told the police officer.

MR. CORRIGAN: Objection, your Honor.

THE COURT: Approach the bench.

(Thereupon, a discussion was had between Court and counsel off the record at the bench, after which the following further proceedings were had in open court:)

THE COURT: Okay. The objection is sustained. You may proceed. Are you finished with this witness?

MISS JOHNSON: No, your Honor. No, I'm not.

THE COURT: Proceed.

Q Directing your attention again to your

[121] interview our investigator., Tom Pavlish –

A Yes.

Q Do you recall telling him that Steve did not have an erection?

A Excuse me. Let me think. I don't want to say nothing I don't remember. Yeah.

Q You remember telling him that?

A I remember telling him that.

Q You weren't telling him the truth. You were lying to him?

A I wasn't – I ain't saying I was lying.

Q But you remember telling –

A I remember telling him. Yes.

Q He explained to you what an erection was?

A Yes.

Q But you said Steve didn't have an erection?

A Steve – wait a minute. I'm thinking about too much stuff.

Q I'm directing your attention to your conversation with the investigator Mr. Pavlish, November 28th?

A Yes.

Q 2001. He asked you whether or not Steve had an erection?

A Yeah. Yeah.

[122] He explained what an erection was and you said, no, Steve did not have an erection?

A All right. I told you I can't remember. I don't remember everything.

Q Well –

A I assumed he had an erection, because I felt some wet stuff down there.

Q Is your testimony here today from your assumptions?

A Yeah, I assumed – I assumed he had an erection. That is what I told the policeman, the Detective Wendland at the police station.

That day I assumed he had an erection.

Q Your information to the officers then was based on an assumption?

A Yeah.

Q And the information that you gave to Tom Pavlish was based on your recollection?

A No, that was an assumption, too.

Q One time you assumed he did and another time you assumed that he didn't and here in court you assume that he did?

A Yes.

Q So you have given two different statements on three different occasions, at least, is that

* * *

[237] Brewer?

A He got into the triage area and was registered about noon, and I believe he was back to an exam room around 1:30. So he left at five o'clock in the afternoon.

Q Somewhere in between there?

A Yes.

Q Okay. What kind of findings did you have on Justin, do you remember?

A I actually had nothing, nothing physical. There was no signs of trauma. His exam was pretty unremarkable.

Q Were you surprised by that?

A Yeah.

MR. YELSKY: Objection. He said –

THE COURT: Just a moment, please. Mr. Asad, ask a question.

Q Based on the allegations that had just been made to you, were you surprised by your findings?

A Yes, I was because there was no signs of trauma, no signs of harsh contact, and there was no signs of genital trauma, no signs of genital fluids of any kind.

Q Based on all the history and your experience in [238] examining sexual assaults, is it unusual when there are no physical markings?

A Unusual – there are no – if there is no physical markings, then there was no sexual assault.

Q With a sexual assault would you expect to see that kind of physical trauma that you were just explaining?

A Usually there's some bruising, swelling to the anal genital area, and sometimes tears to the anal and genital area.

Q What about in the case where someone just rubbed you?

A Unless there was a very forceful rubbing there wouldn't be any damage obvious on the skin that I would see.

Q. Did you see anything on this one?

A I did not.

MR. ASAD: All right. Just one second, your Honor.

Q Doctor, I would like to ask you, based on the allegations that were made to you by this victim in this case, Justin Brewer, did you find it unusual that you saw no physical symptoms?

A Yes.

Q Okay. Do you remember what the allegations he [239] made to you were?

A The presenting complaint – he told me someone rubbed up against him. And this was a sexual contact because he had – he spent the night at the friend's house and when he woke he was on top of a grown man without his clothes on and his underwear were on the floor.

Q All right. And what about the fact that the lubricant would have been used?

A Well, if there's some lubricant used I guess someone was trying to have some penetration of some kind, but I had no findings of that.

Q You had no findings that penetration was attempted?

A Correct. Just told me – I asked him, do you think you were penetrated, and he said no. I believe he did tell me though he may have been fondled.

And in my nurses' notes in the chart there's evidence that Justin had told her that he did see a semen stain on the person's leg who had allegedly done this to him.

Q Okay. I want to talk a little bit about medicine. You prescribe medicine as a doctor?

A Talking pharmacologics now?

Q Yes.

[240] A Yes, I do.

Q And how – what do you know about nutrition in the health field?

A Quite a bit.

MR. YELSKY: Objection. I believe we're going –

THE COURT: Are you objecting?

MR. YELSKY: Yes.

THE COURT: Overruled.

Q What do you know about nutrition and health field?

A A substantial amount because I'm a fitness person myself. When I was practicing my urgent care medicine I did quite a bit of sports medicine in this urgent care setting.

Q Have you ever heard of Melatonin?

A I have actually taken it myself.

Q Have you ever prescribed it?

A You can't prescribe it. It's a food supplement. It's essentially a vitimin.

Q What is Melatonin used for?

A Melatonin is a naturally secreted hormone from the pineal gland of the brain and the vitimin [sic] literature states that people that have trouble sleeping, as they they get older their Melatonin [241] levels decrease and that it stops them from getting good REM sleep.

The theory behind it, if you take this food supplement it will aid in processing and making your own Melatonin and you will sleep better.

MR. ASAD: One second.

Q Doctor, were your findings then on Justin Brewer consistent based on the allegations that he made to you?

A No.

Q Why not?

A There was no signs of forced tissue damage, swollen redness, tears, ecchymosis, discoloration, and I found no – I don't know what this showed because I don't know from the evidence I collected, but there was no obvious genital fluids on Justin.

Q What would cause that – cause the genital fluid?

A Someone who had ejaculated on a person.

Q What about the abrasions, what would cause that?

A That would show trauma or attempted forced penetration.

Q And laceration?

A And laceration.

[242] Q It would show an attempted force of penetration?

A Yes.

Q And in a case though where there was a lubricant used and no forced penetration, is it uncommon what you found?

A No.

MR. ASAD: Thank you.

THE COURT: Cross-examination?

MR. YELSKY: Yes.

CROSS-EXAMINATION OF CARY SCOTT, M.D.

BY MR. YELSKY:

Q Doctor, my name is Leonard Yelsky. I'm one of the defendant's lawyers.

A Sure.

Q You did a very thorough job on your Rape Kit, correct?

A Yes.

Q And you left no stone unturned, correct?

A I don't believe so.

Q And you were looking for sperm from a perpetrator?

A Semen, sperm, somebody's other DNA substance on [243] Justin. That's what I was looking for.

Q Did you find any?

A I don't think I did.

Q Now, when you examined this young man you found no signs of trauma?

A Correct.

Q You found no bruising?

A That's right.

Q You found no evidence of any penile types or attempts at penetration?

A Yes.

Q And you were surprised because the story the young man told you was not consistent with what you found, correct?

A Yes.

MR. YELSKY: No further questions.

THE COURT: You're excused.

THE WITNESS: Thank you.

THE COURT: We'll take a short break, ladies and gentlemen.

(Thereupon, the following proceedings were had out of the hearing of the jury.)

APPENDIX F

Cuyahoga County Common Pleas

THE STATE OF OHIO vs. STEVEN CROTTS	A TRUE BILL INDICTMENT FOR GROSS SEXUAL IMPOSITION R.C. 2907.05 (Filed Apr. 26, 2001)

DATE OF OFFENSE	THE TERM OF	CASE NO.	COUNT
December 26, 1998 to January 3, 1999	**JANUARY OF 2001**	**CR 406396**	**1**

The State of Ohio,)
) **SS.**
CUYAHOGA COUNTY)

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, **IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO**, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully

had sexual contact with Ronnie Justice, not his spouse, by purposely compelling such person to submit by force or threat of force

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ Michael L. [Illegible]
Foreman of the Grand Jury

/s/ William A. [Illegible]
Prosecuting Attorney

INDICTMENT – ORIGINAL

F-2

Cuyahoga County Common Pleas

THE STATE OF OHIO vs. STEVEN CROTTS	A TRUE BILL INDICTMENT FOR GROSS SEXUAL IMPOSITION R.C. 2907.05

DATE OF OFFENSE	THE TERM OF	CASE NO.	COUNT
December 26, 1998 to January 3, 1999	**JANUARY OF 2001**	**CR 406396**	**2**

The State of Ohio,)
) **SS.**
CUYAHOGA COUNTY)

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, **IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO**, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully

had sexual contact with Ronnie Justice, not his spouse, by purposely compelling such person to submit by force or threat of force

The State of Ohio,) I, GERALD E. FUERST,
) **SS.** THE COURT OF COM-
CUYAHOGA COUNTY) MON PLEAS WITHIN AND FOR SAID COUNTY, HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL Criminal Journal Entry CR 406396 NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT HIS 22 DAY OF APRIL, A.D. 2005
GERALD E. FUERST, Clerk
By /s/ [illegible] Deputy

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ Michael L. [Illegible] /s/ William A. [Illegible]
Foreman of the Grand Jury Prosecuting Attorney

INDICTMENT – ORIGINAL

CITY OF MAPLE HEIGHTS, OHIO

COMPLAINT AND AFFIDAVIT

STATE OF OHIO	)	**IN THE**
	) **SS**	**GARFIELD HEIGHTS**
COUNTY OF CUYAHOGA	)	**MUNICIPAL COURT**

(Filed [Illegible])

Before me, Lt. R. Maracz, a Deputy Clerk of the Garfield Heights Municipal court, personally came Michael Ciaravino, who being duly sworn according to law, deposes and says that on or about the 16 day of Jan., 1999, about 09:52 M. at 5065 Lee Rd. Maple Heights, Ohio 44137 in said County and State, one

Steven A. Crotts, DOB.07/20/60, SSN. 272-66-3477, 5065 Lee Rd. Maple Heights, Ohio 44137, purposely or knowingly engaged in conduct which, if successful, would have constituted or, resulted in the offense of Rape, ORC 2907.02 defined as: Steven A. Crotts engaged in sexual conduct with Justin Brewer (DOB. 12/23/86), a person who was not Steven A. Crotts spouse at the time and the said Justin Brewer was at the time a person under age thirteen

In violation Section Incorporating 2907.02-2923.02 of the Ohio Revised Code in violation of Section _____ of the Codified Ordinances of the City of Maple Heights, Ohio, a Felony of the Second degree in such cases made and provided, and further says not.

/s/ [Illegible]
Affiant

SWORN TO and subscribed before me, this 19 day of January, 1999.

By _____ /s/ [Illegible]
Prosecuting Attorney ~~Judge, Clerk~~, Deputy Clerk

DEPOSIT FOR COSTS: _____

_____

IN THE COURT OF COMMON PLEAS

STATE OF OHIO)
) **SS.**
COUNTY OF CUYAHOGA)

JANUARY TERM, 1999
TO-WIT: MARCH 29 1999
NO. CR ~~7C1010~~ 391336

STATE OF OHIO)
PLAINTIFF)
)
vs.)
)
STEVE A CROTTS)
DEFENDANT)

INDICTMENT

ATTEMPT, RAPE

(Filed Apr. 6, 1999)

JOURNAL ENTRY

DEFENDANT'S MOTION TO DISMISS PRE-INDICTMENT CHARGES IS HEREBY GRANTED.

THE STATE OF OHIO) I, GERALD E. FUERST,
) SS CLERK OF THE COURT
Cuyahoga County) OF COMMON PLEAS WITHIN AND FOR SAID COUNTY. HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL Criminal Journal Entry CR-391336 NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 27TH DAY OF April A.D. 2004

GERALD E. FUERST, Clerk

By /s/ Lisa A. Jones Deputy

03-29-1999
D-S PAK 03/31/99 10:42

JUDGE /s/ Richard J McMonagle
RICHARD J MCMONAGLE

COPIES SENT TO:

☒ Sheriff MCH 4-6-99 ☐ Other _____

☐ Defendant _____ _____

THE STATE OF OHIO)
Cuyahoga County) ss I, GERALD E. FUERST,

Clerk of the Common Pleas Court within and for said County, and in whose custody the files, Journals and Records of said Court are required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied from the ~~Journal~~ Docket CR-406396 of the proceedings of the Common Pleas Court within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said ~~Journal~~ Docket CR-406396 and that the same is a correct transcript thereof.

[SEAL] *In Testimony Whereof*, I do hereunto subscribe any name officially and affix the seal of said Court, at the Court House in the City of Cleveland, in said County, this 27th day of April, A.D. 2004

GERALD E. FUERST, Clerk of Courts

By /s/ Lisa A. Jones Deputy Clerk

CLDK 406396 0175178
CROTTS, STEVEN DOB-07201960 MALE CAUC

5/21/02 08:30 – NXT SCH. SENTNG * CASE CLOSED *
JUDGE KATHLEEN A SUTULA
ARREST MAPLE HEIGHTS * DEFN LVJAIL *
ATTY PUBLIC DEFENDERS
04/26/01 INDICTED ORIGINAL IJIS-CKD=NO
ATTY MARVIN T WARREN
05/03/01 SUMMONS#=00003174 JAIL DAYS
PO-R ANTHONY I RINELLA 177911
05/11/01 CAPIAS
06/04/01 SUMMONS#=00003174
NON-DELIV.

			CASE CHARGES	
10/31/01	Jail			
11/01/01	Arraigned	2907.05	Gross Sexual Imposition	01
11/05/01	Bail	2907.05	Gross Sexual Imposition	02
04/10/02	Trial	2907.05	Gross Sexual Imposition	03
04/11/02	Trial	2907.05	Gross Sexual Imposition	04
04/16/02	Trial	2905.01	Kidnpp w/Sex Mot. Spec.	05
04/17/02	Trial		Bindover Charges	
04/18/02	Jail	2907.05	Gross Sexual Imposition	01
04/18/02	Referred Probation	Bond	Bond Set Cash/Surety/ Prop.	
05/16/02	P.S.I. CPT	No	Amt 25,000 Set 11/01/2001	
05/21/02	Sentenced			
		Bond	Cash Bond	
		No 109662	25,000 Made 11/05/2001	
		Amt		

Sutula 05/21/02, Disp. Fnd Glty – Jury To Indict
Sentenced 13yr
Must Pay Cost,
Other Cases 391336 Other Defn.

JUDGE: 316-TIMOTHY MCCORMICK
DATE: 05-11-2001 TIME: 09:52::23
DESCRIPTOR: CAPI-CAPIAS PGH: 02
JOURNAL ENTRY FILED: 05/15/2001
CAPIAS ISSUED ON 05/11/01
. . CEK 05/11/01 09:52

JUDGE: 294-CLERKS OFFICE
DATE: 10-31-2001 TIME: 15:37::42
DESCRIPTOR: MNOT-MISC. NOTE PGH: 01
JOURNAL ENTRY FILED: / /
CAPIAS RETURNED; DEFT. IN CUSTODY
. . CEK 11/01/01 15:37

JUDGE: 138-ANN T MANNEN
DATE: 11-01-2001 TIME: 10:23::17
DESCRIPTOR: ARGN-ARRAIGNMENT PGH: 02
JOURNAL ENTRY FILED: 11/05/2001
DEFENDANT FULLY ADVISED IN OPEN COURT OF HIS/HER CONSTITUTIONAL RIGHTS.
READING OF INDICTMENT WAIVED.
TWENTY-FOUR HOUR SERVICE WAIVED.
DEFENDANT DECLARED INDIGENT.
COURT ASSIGNED PUBLIC DEFENDERS AS COUNSEL.
DEFN PLEAD NOT GUILTY TO INDICTMENT.
JUDGE KATHLEEN A SUTULA ASSIGNED TO CASE.
BOND SET AT 25,000 DOLLARS. BOND TYPE: CASH/ SURETY/PROP.
BOND CONDITIONS: NO CONTACT WITH VICTIM.
ADDITIONAL AMOUNT OF BAIL AS SET FORTH IN ORC. 2743.70 AND ORC. 2949.091
. . SJO 11/01/01 10:23

JUDGE: 304-KATHLEEN A. SUTULA
DATE: 11-06-2001 TIME: 12:53::31
DESCRIPTOR: PRTR-PRETRIAL PGH:
JOURNAL ENTRY FILED: 11/14/2001
DEFENDANT RETAINS ATTORNEY MARVIN WARREN (216-662-5989) AS COUNSEL. FIRST

JUDGE: 294-CLERKS OFFICE
DATE: 04-09-2002 TIME: 09:12::10
DESCRIPTOR: MTD-MTN. TO DISMISS PGH: 01
JOURNAL ENTRY FILED: / /
MOTION TO DISMISS, FILED
. . LRE 04/10/02 09:12

JUDGE: 294-CLERKS OFFICE
DATE: 04-09-2002 TIME: 09:12::39
DESCRIPTOR: CFIL-CLERKS FILING PGH: 01
JOURNAL ENTRY FILED: / /
DEFENDANT'S WITNESS LIST, FILED
. . LRE 04/10/02 09:12

JUDGE: 304-KATHLEEN A SUTULA
DATE: 04-10-2002 TIME: 09:53::09
DESCRIPTOR: MTN-MOTION PGH:
JOURNAL ENTRY FILED: 04/16/2002
DEFENDANT'S MOTION FILED MARCH 4, 2002, IN LIMINE IS GRANTED ON THE RECORD.
DEFENDANT'S MOTION FILED FEBRUARY 27, 2002, FOR SEVERANCE GRANTED. STATE ELECTS TO PROCEED ON COUNTS 3, 4 AND 5.
. . CAL 04/11/02 09:53

JUDGE: 304-KATHLEEN A SUTULA
DATE: 04-10-2002 TIME: 11:36::51
DESCRIPTOR: MDIS-MOTION DISPOSED PGH:
JOURNAL ENTRY FILED: / /
MTN FOR WITNESS LISTS MTN TO DISMISS SKUTNIK HAS FILE, JLS
. . JLS 04/10/02 11:36

JUDGE: 304-KATHLEEN A SUTULA
DATE: 04-10-2002 TIME: 13:52::12
DESCRIPTOR: TRL-ON TRIAL PGH:
JOURNAL ENTRY FILED: 04/16/2002
DEFENDANT IN COURT WITH ATTORNEY ALMETA JOHNSON, ATTORNEY MARVIN WARREN AND

ATTORNEY LEONARD YELSKY. PROSECUTING ATTORNEYS FAIRS ASAD AND PETER CORRIGAN PRESENT ALONG WITH COURT REPORTER TOM WALTERS. DEFENDANT WAS ADVISED OF ALL CONSTITUTIONAL RIGHTS.

JURY IMPANELLED [sic] AND SWORN.

. . HEB 04/11/02 14:42

JUDGE: 304-KATHLEEN A SUTULA
DATE: 04-10-2002 TIME: 15:22::47
DESCRIPTOR: MTN-MOTION PGH:
JOURNAL ENTRY FILED: 04/16/2002

DEFENDANT'S MOTION TO DISMISS BASED UPON THE SPEEDY TRIAL ACT IS DENIED. PURSUANT TO THIS COURT'S DIRECTION, COUNSEL FOR THE DEFENDANT TOGETHER WITH THE STATE ON OR ABOUT FEBRUARY 1, 2002 PREPARED A SPEEDY TRIAL COMPUTATION WHICH INDICATED THAT DEFENDANT'S SPEEDY TRIAL RIGHTS WOULD NOT EXPIRE UNTIL JULY, 2002. MOREOVER, THE INITIAL TRIAL DATE OF JANUARY 9, 2002 WAS CONTINUED THREE TIMES, ALL CONTINUANCES REQUESTED BY DEFENDANT.

TOLLING FOR ANY ONE OF THESE REQUESTS DEFEATS DEFENDANT'S MOTION.

. . SKM 04/11/02 15:22

JUDGE: 304-KATHLEEN A SUTULA
DATE: 04-11-2002 TIME: 07:59::14
DESCRIPTOR: TRL-ON TRIAL PGH:
JOURNAL ENTRY FILED: 04/17/2002

DEFENDANT IN COURT WITH COUNSEL. PROSECUTING ATTORNEY PRESENT. TRIAL IN PROGRESS.

. . BXM 04/15/02 07:59

JUDGE: 304-KATHLEEN A SUTULA
DATE: 04-18-2002 TIME: 15:05::53
DESCRIPTOR: PRTR-PRETRIAL PGH:

JOURNAL ENTRY FILED: 04/24/2002
PRETRIAL SET ON COUNTS 1 AND 2 FOR APRIL 26, 2002 AT 9:00 A.M.
. . EDB 04/22/02 15:05

JUDGE: 304-KATHLEEN A SUTULA
DATE: 04-26-2002 TIME: 13:35::35
DESCRIPTOR: PRTR-PRETRIAL PGH:
JOURNAL ENTRY FILED: 05/02/2002
PRETRIAL ON COUNTS 1 AND 2 NOT HELD. PRETRIAL RESET TO MAY 1, 2002 AT 9:00 A.M.
. . JEB 04/29/02 13:35

JUDGE: 294-CLERKS OFFICE
DATE: 05-02-2002 TIME: 16:00::13
DESCRIPTOR: MNW-MTN.NEW TRIAL PGH: 01
JOURNAL ENTRY FILED: / /
MOTION FOR NEW TRIAL, FILED.
. . LRE 05/03/02 16:00

JUDGE: 304-KATHLEEN A SUTULA
DATE: 05-03-2002 TIME: 07:45::51
DESCRIPTOR: MDIS-MOTION DISPOSED PGH:
JOURNAL ENTRY FILED: / /
MOTION FOR NEW TRIAL; ASAD HAS FILE (MRN)
. . MRN 05/07/02 7:45

JUDGE: 304-KATHLEEN A SUTULA
DATE: 05-09-2002 TIME: 12:03::20
DESCRIPTOR: MDIS-MOTION DISPOSED PGH:
JOURNAL ENTRY FILED: / /
MOTION FOR NEW TRIAL, ASAD HAS FILE (MRN)
. . MRN 05/13/02 12:05

JUDGE: 304-KATHLEEN A SUTULA
DATE: 05-21-2002 TIME: 10:30::13
DESCRIPTOR: SENT SENTENCE PGH:
JOURNAL ENTRY FILED: 05/29/2002
DEFENDANT IN COURT WITH ATTORNEYS ALMETA JOHNSON AND LEONARD YELSKY.

THE STATE OF OHIO DISMISSES COUNTS 1 AND 2.

ON A FORMER DAY OF COURT DEFENDANT WAS FOUND GUILTY BY THE JURY OF GROSS SEXUAL IMPOSITION RC 2907.05 F-3 SENATE BILL 2 AS CHARGED IN COUNTS 3 AND 4 AND GUILTY OF KIDNAPPING RC 2905.01 AND FURTHER FOUND THE DEFENDANT GUILTY OF SEXUAL MOTIVATION SPECIFICATION, F-1 SENATE BILL 2 AS CHARGED IN COUNT 5.

DEFENDANT, PROSECUTORS FARIS ASAD AND PETER CORRIGAN AND VICTIM/REPRESENTATIVE ADDRESS THE COURT.

THE COURT CONSIDERED ALL OF THE REQUIRED FACTORS OF THE LAW.

THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF RC 2929.11.

THE COURT IMPOSES A PRISON TERM AT LORAIN CORRECTIONAL INSTITUTION OF 5 YEARS AS TO EACH OF COUNTS 3 AND 4 AND 8 YEARS AS TO COUNT 5. COUNTS 3 AND 4 TO RUN CONCURRENTLY WITH EACH OTHER AND CONSECUTIVELY TO COUNT 5, FOR TOTAL SENTENCE OF 13 YEARS.

DEFENDANT TO RECEIVE 40 DAYS JAIL TIME CREDIT AS OF MAY 21, 2002.

FIVE YEARS POST RELEASE CONTROL IS A PART OF THIS PRISON SENTENCE FOR THE ABOVE FELONY (S) UNDER R. C.2967.28.

DEFENDANT IS TO PAY COURT COSTS.

DEFENDANT ADVISED OF APPEAL RIGHTS.

SENTENCING ADDENDUM PREPARED. ORDER SEE JOURNAL.

. . KLS 05/23/02 10:30